

STATE OF MICHIGAN
COURT OF APPEALS

DAVID SINCLAIR,

Plaintiff-Appellant,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellee,

and

DETROIT WATER AND SEWERAGE
DEPARTMENT,

Third-Party Defendant.

UNPUBLISHED

June 4, 2015

No. 319317

Wayne Circuit Court

LC No. 11-011115-NZ

GLORIE STONISCH, JORGE STONISCH,
ZENON KOSSACK, EUGENIA KOSSACK,
MICHELENE LEPCZYK, and JAMES
LEPCZYK,

Plaintiffs-Appellants,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellee.

No. 319318

Wayne Circuit Court

LC No. 13-007152-NZ

KAREN ALLISON, et al.,

Plaintiffs-Appellants,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellee.

No. 319319

Wayne Circuit Court

LC No. 13-007151-NZ

EDWARD ABRAHAM, et al.,

Plaintiffs-Appellees,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellant.

No. 319368
Wayne Circuit Court
LC No. 13-007154-NZ

LAWRENCE BOURBEAU, MARY
BOURBEAU, CLARINDA RAY, RICHARD
RAY, GLORIE STONISCH, and JORGE
STONISCH,

Plaintiffs-Appellees,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellant.

No. 319370
Wayne Circuit Court
LC No. 13-007156-NZ

LAWRENCE CHOLODY, TARA CHOLODY,
VICTOR KOPPANG, and MARY KOPPANG,

Plaintiffs-Appellees,

v

CITY OF GROSSE POINTE FARMS,

Defendant-Appellant.

No. 319371
Wayne Circuit Court
LC No. 11-015209-NZ

Before: TALBOT, C.J., and MURPHY and GLEICHER, JJ.

TALBOT, C.J. (*Dissenting.*)

I respectfully dissent from the majority's opinion. In my view, each theory pursued by plaintiffs fails to create a question of fact sufficient to survive the City's motion for summary disposition. Accordingly, in Docket Numbers 319317, 319318, and 319319, I would affirm the

trial court's decision, and in Docket Numbers 319368, 319370, and 319371, I would reverse the trial court's decision and remand for entry of an order granting summary disposition in favor of the City.

I. FACTS AND PROCEDURAL HISTORY

On the whole, the majority sufficiently states the pertinent facts regarding what occurred during each event. To summarize, in May, 2011, during a severe storm, several momentary power losses stopped the pumps at the KPS, and while the pumps were not operating, the basements of over 200 homes flooded. In September, 2011, again during a severe storm, the KPS experienced power surges which disabled the pumps. While the pumps were inoperable, the basements of over 300 homes flooded.

The majority does not, however, explain how the case developed in the trial court. Plaintiffs' first expert, Paul Fleming, theorized that in both cases, lightning struck the Grosse Pointe Substation, the substation through which lines 32T and 191T pass before reaching the KPS. Plaintiffs alleged that it was a defect under the Ten States Standards to have the two power lines pass through the same substation. Thus, their original theory was that had the power lines been separated, the KPS would not have lost power and no flooding would have occurred. However, Fleming's theory was just that—a theory. There was no evidence of a lightning strike at the Grosse Pointe Substation during either event. And, as the majority discusses, it was determined that during both events, only one power line suffered any disturbances. Understandably, plaintiffs have since abandoned Fleming's theory.

Plaintiffs next turned their attention to the switchgear that transfers power between the two power lines. Relying on the opinions of three experts, Heyl, VanLiere, and Michael Williams, plaintiffs asserted that during the May event, the switchgear caused a sort of cycling between the two lines. According to these experts, a four-step process would repeat: line 32T would lose power, power would be transferred to line 191T, line 32T would come back on, and the switchgear would transfer power back to line 32T. Plaintiffs' experts opined that line 32T was unstable during the entire May event and that it was a defect for the switchgear to continue transferring power back to that line. According to Heyl, VanLiere, and Williams, these unnecessary transfers increased the total time the pumps were inoperable, and thus, were a substantial proximate cause of the backups. Heyl also proffered a second theory, parroted by VanLiere: that two control panels should have been utilized, such that if line 32T lost power, only half of the pumps would be affected. However, it was then determined that the switchgear never transferred power during the May event, thwarting the first theory. Heyl also admitted in a deposition that he had not made any calculations to determine what effect his proffered electrical configuration would have had. He further admitted that the Ten States Standards did not require such a configuration, and that the only support suggesting such a configuration were EPA guidelines that did not apply to the KPS.

On September 26, 2013, the trial court entered an order regarding discovery and summary disposition motions. The trial court ordered that discovery be completed by October 31, 2013. It ordered that summary disposition motions be heard no later than October 31, 2013. It also ordered that all depositions of named experts be completed by the end of the first week of October, 2013.

On October 10, 2013, the City filed its motions¹ for summary disposition. Under the trial court's order, this was the latest possible date that the motions could be filed because a motion for summary disposition brought under MCR 2.116 "must be filed and served at least 21 days before the time set for the hearing."² The City's motions argued that the theories crafted by plaintiffs' experts were unsupported and failed to demonstrate that any alleged defect caused the sewer backups. Plaintiffs responded to the motions on October 25, 2013, a mere six days before the motions were scheduled to be heard. Plaintiffs relied largely on several new affidavits of their experts, which raised several entirely different claims of defective conditions that caused the floods.³ Arbour's affidavit, on which plaintiffs heavily relied, was dated October 24, 2013. Heyl's and VanLiere's affidavits, each their third, were dated October 23, 2013. The day before the hearing, plaintiffs filed supplemental briefs raising yet another new theory, this time blaming the power losses on electrical faults within the pumps themselves. The City filed replies in each case the same day, attaching affidavits contesting the theories raised in plaintiffs' responses. The majority now chastises the City for filing these affidavits so soon before the motion hearing.

As is fairly self-evident from this sequence of filings, the majority's suggestion that it was somehow improper for the City to file affidavits immediately before the hearing is specious. The City complied with the MCR 2.116(G)(1)(a)(i), filing its motions, briefs, and supporting exhibits precisely 21 days before the scheduled hearing. It was plaintiffs who then presented new theories, supported by day-old affidavits, in an eleventh-hour effort to avoid summary disposition. By doing so, plaintiffs also prevented the City from deposing plaintiffs' experts regarding these new theories because the time for deposing expert witnesses had passed. Under the circumstances, I see no infirmity in the City being allowed to contest plaintiffs' new theories with affidavits.

Moreover, the majority has raised this point entirely on its own. Plaintiffs have not contested the timing of the City's filings on appeal, nor did they challenge the City's filings in the trial court. The majority also fails to acknowledge that the trial court invited the parties to file additional pleadings and submit additional evidence after the motion hearing.⁴ Yet in a supplemental pleading filed the day after the motion hearing, plaintiffs stated, "Plaintiffs do not wish to reargue the merits of their case or add additional substantive discussion." The City, on the other hand, took the opportunity to file supplemental pleadings responding to the new theories argued by plaintiffs in their briefs filed on October 30, 2013. The trial court specifically noted that it considered these filings before it made its decision. Had plaintiffs wished to present

¹ Because the May cases were consolidated together and the September cases consolidated separately, two motions, one with regard to each case, were filed.

² MCR 2.116(G)(1)(a)(i).

³ Indeed, the only theory raised which was previously discussed by plaintiffs' experts was their suggestion that the KPS operate its pumps with two separate control panels.

⁴ At the conclusion of the October 31, 2013 hearing, the trial court stated, "And if there's anything else you want me to read, give it to me by tomorrow, after what you've said here today."

evidence contesting that which was presented by the City in reply to plaintiffs' new theories, plaintiffs could have done so. That plaintiffs did not wish to take advantage of this opportunity does not, in my mind, render the City's actions improper.

II. ANALYSIS

A. LAW

The majority accurately states the law as it pertains to what must be shown to defeat governmental immunity with respect to sewer disposal system events. The majority, however, offers no discussion of the quantum of evidence required to demonstrate causation. Plaintiffs were required to demonstrate not only that their claimed defects were a proximate cause of the backups, but that these defects were a "substantial proximate cause" of the backups.⁵ A substantial proximate cause is defined as "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury."⁶ "[P]roving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'"⁷ "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred."⁸ While circumstantial evidence may be sufficient to prove causation, speculation is insufficient to create a question of fact.⁹ As our Supreme Court has explained:

As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

* * *

[A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence

⁵ MCL 691.1417(3)(e).

⁶ MCL 691.1416(l).

⁷ *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999).

⁸ *Id.* at 163.

⁹ *Id.* at 164.

from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.^[10]

The evidence must demonstrate more than a possibility of causation; it must demonstrate "a reasonable likelihood of probability" ¹¹ It is not necessary to negate every other possible cause, but the evidence must "exclude other reasonable hypotheses with a fair amount of certainty."¹² Most importantly in this matter, it is not enough for an expert witness to simply opine that a particular defect or defects caused an injury. An expert's conclusory averments, devoid of any detail, are insufficient to create a question of fact.¹³ An expert's opinion must set forth specific facts that support a reasonable inference of cause and effect, and must similarly exclude other reasonable hypotheses with a fair degree of certainty.¹⁴ An expert's opinion that is based only on hypothetical situations does not meet this burden.¹⁵ Rather, there must be facts in evidence supporting the expert's opinion.¹⁶

It is also important to bear in mind that a governmental agency is not liable for damages resulting from a sewer disposal system event simply because a defect was a substantial proximate cause of the event. Rather, the governmental agency must also have "failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect."¹⁷ Thus, it is a municipality's unreasonable failure to remedy a defect, not the mere existence of the defect, that opens the door to liability.¹⁸

B. APPLICATION

1. THE MAY EVENT

Based on what occurred at the KPS during the May event, what caused the sewage backups would seem fairly obvious. The momentary power losses experienced at the KPS stopped the pumps, and when the pumps stopped operating, sewage was forced into plaintiffs'

¹⁰ *Id.* at 164-165 (quotation omitted).

¹¹ *Id.* at 166 (quotation omitted).

¹² *Id.* (quotation omitted).

¹³ *Rose v National Auction Grp, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002); *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

¹⁴ *Teal v Prasad*, 283 Mich App 384, 394-395; 772 NW2d 57 (2009).

¹⁵ *Id.*

¹⁶ *Id.* at 395.

¹⁷ MCL 691.1417(3)(d).

¹⁸ See *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 286 n 7; 745 NW2d 513 (2007) (noting, albeit in dictum, that a governmental agency is not liable because a particular defect exists, but for failing to reasonably remedy that defect).

basements. Plaintiffs have pursued several different theories on appeal, each purporting to place the blame for these backups on the City's shoulders. In an effort to avoid what appears to be an obvious causal chain, the majority accepts most of the theories pursued by plaintiffs. However, a careful examination demonstrates that none of the theories pursued by plaintiffs is sufficient to avoid summary disposition.

The first theory adopted by the majority is that the Inland system was defectively designed, in that the sewer system could convey sewage at a faster rate than the KPS's pumps were capable of discharging. It is undisputed that until the pumps stopped operating, the KPS's wet well was well below the level where basement flooding would occur. It was only after the first "Edison bump" that the level of sewage in the wet well rose to a point where flooding would occur. It is also undisputed that after seven of the eight pumps resumed normal operation, the wet well level rapidly decreased. As this evidence makes clear, the KPS was designed with sufficient capacity to handle the peak flows of the May storm. Several of plaintiffs own experts apparently agree, opining that no backups would have occurred had the pumps not lost power. Reasonable minds could not find that a lack of overall pumping capacity was a cause of the backups.

The majority relies on the peak flow calculations provided by modeling data in 1997. This data demonstrated that during a hypothetical 10-year, one-hour rain event, sewage and storm water would flow to the KPS at a rate of up to 554 CFS. The hypothetical storm modeled was one where, over the course of *one hour*, 1.75 inches of rain fell in the Inland District in a uniform pattern. According to the rainfall data relied on by plaintiffs, the May storm was a 10-year, *12-hour* event. According to this data, an average of 3.3 inches of rain fell over 12 hours across the Inland District. This is equivalent to a rate of approximately .275 inches of rain per hour. In other words, the hypothetical storm modeled in 1997 was one where rain would fall at a rate nearly seven times the rate that actually occurred in May, 2011. To assume that the peak flows of the May event reached 550 CFS is nothing more than speculation, speculation that is not even supported by the 1997 modeling data itself. Particularly in light of the evidence of what actually occurred during the May event, I would not permit plaintiffs to rely on modeling of a hypothetical storm to create a question of fact regarding causation.¹⁹

But even accepting that an alleged lack of capacity could have caused the floods, there is no question of fact regarding whether the City remedied this alleged defect. Plaintiffs rely on a provision of the Ten States Standards which requires a pumping station to be able to handle its projected peak flows with any one pump out of service. In this case, Plaintiffs allege that with 554 CFS of sewage potentially entering the station, the City should have had upwards of 800 CFS of pumping capacity. Plaintiffs rely on the same modeling data discussed above, completed in 1997. However, in his affidavit, Biehl testified:

4. The sewer system for the City's Inland District incorporates restrictive covers on approximately half of the system's catch basins. This limits the amount of water that can flow from the streets into the sewer system to approximately 390

¹⁹ *Teal*, 283 Mich App at 394-395.

CFS for the 10 yr./1 hr. design storm, which the City's pump station can handle even with pump 8, the largest storm pump, out of service.²⁰

Plaintiffs offer no evidence contradicting this testimony. They simply argue that it cannot be believed because at his deposition, Biehl was unable to provide specific details regarding the covers, such as who manufactured them. Of course, as the majority recognizes, it is not for the trial court or this Court to weigh the credibility of witnesses.²¹ Moreover, after carefully reviewing the trial court record, it does not appear that the deposition testimony relied on by plaintiffs, as well as by the majority,²² was presented to the trial court. Rather, plaintiffs have attempted to expand the record by attaching this deposition as an exhibit to their brief on appeal. It is well-established that this Court's review of the trial court's decision is limited to the record established in the trial court, and that the parties may not expand the record on appeal.²³

The majority takes the position that Biehl's testimony is unsupported, and thus, must be disregarded. Biehl was not providing an opinion. Rather, he was testifying to two facts: (1) the covers exist, and (2) the covers reduce the flows to the KPS to 390 CFS. While it is certainly true that an expert's opinions must be based on facts in evidence,²⁴ there is no requirement that a witness's factual testimony must be supported by additional factual evidence before it can be accepted.²⁵ This Court cannot simply ignore his factual testimony because it lacks further evidentiary support. Rather, it was for plaintiffs to present evidence contradicting the facts testified to by Biehl.²⁶ Plaintiffs are wholly unable to do so.

I also disagree with the majority's belief that the 1997 report contradicts Biehl's contention that the restrictive covers reduce the flow to the KPS to 390 CFS. The scope of the 1997 report was essentially two-fold: (1) an examination into the state of the sewer system to determine what repairs were needed and the cost of these repairs, and (2) to model flows to the KPS to determine whether the capacity of the pumping station supported the capacity of the

²⁰ The parties sometimes refer to the covers as covers on catch basins, and at other times, as covers on manholes. As is clear in the 1997 report, the manholes are the sewer system's catch basins.

²¹ *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008).

²² *Ante* at 25 n 11.

²³ *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

²⁴ *Teal*, 283 Mich App at 395.

²⁵ As an example, on a motion for summary disposition, a trial court could not ignore testimony from an eyewitness stating that a car was blue because there were no photographs to confirm this testimony. The trial court would be bound to accept that testimony as accurate unless it was contradicted by other evidence.

²⁶ *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009).

sewers. The report provides a thorough examination of sewer pipes, or the “links” used in the modeling software, and manholes, the “nodes” used in the modeling software. The report contains photographs of several manholes, which are exactly what one would expect: holes in the ground, into which an adult could descend via integrated steps. The report analyzes the condition of these manholes. Some manholes are constructed with brick and mortar, others with concrete. Some have debris collected in the bottom; others have cracks requiring repair. But as the City notes, there is no discussion whatsoever of restrictive covers, or indeed, of any covers at all, anywhere in the report. Certainly, the modeling data took the manholes themselves into account when it performed the modeling. The manholes, which serve as the system’s catch basins, are an integral part of the system. However, given the extensive examination of the condition of the manholes, one would expect that if the modeling considered the restrictive covers, those covers would be at least mentioned somewhere in the report. That the modeling considered manholes themselves in no way demonstrates that the modeling also considered the restrictive covers discussed by Biehl.²⁷

The effect of accepting Biehl’s testimony completely undermines plaintiffs’ theory. Accepting that there was an imbalance between the sewer system and the KPS in 1997, the City could remedy the problem in one of two ways: either increase the KPS’s pumping capacity, as plaintiffs contend, or reduce the flow to the KPS. The record demonstrates that the City took the latter avenue. In other words, the City has remedied the defect alleged to exist by plaintiffs. As such, plaintiffs cannot rely on a lack of overall pumping capacity.²⁸ It is also curious that neither plaintiffs nor their experts have offered any discussion of whether it would even be possible to increase the pumping capacity of the KPS. One must remember that the KPS is not the end of the equation. The KPS must convey flows to the Fox Creek Interceptor, where the flows are stored before being conveyed to a treatment facility operated by the Detroit Water and Sewerage Department (DWSD). It is entirely unknown whether the Fox Creek Interceptor could handle increased flows from the KPS, or whether the DWSD would allow increased flows at its treatment facility. I fail to see how plaintiffs have created a question of fact regarding whether the City unreasonably failed to remedy the alleged imbalance between the sewer system and the KPS.

The next theory accepted by the majority is that the City, which split power for its eight pumps between the two power lines, should have also had a second control panel and split the pumps between the two panels. Plaintiffs contend that had the City done so, at least half of the pumps would have operated at all times during the storm. At the outset, I see no evidence in the record establishing that it was a defect to utilize a single control panel. This theory originated from Heyl, who opined that a guideline promulgated by the EPA would require such a system. However, Heyl also admitted that this guideline did not apply to the KPS because it was not federally funded. Moreover, the EPA guideline at issue is one for wastewater *treatment* facilities. Clearly, the KPS is not a treatment facility; it is a pumping station which conveys

²⁷ One obvious reason for this omission could be that the covers were not in place at the time of the report.

²⁸ MCL 691.1417(3)(d). See also *Bosanic*, 277 Mich App at 286 n 7.

sewage to a treatment facility. Heyl admitted that the standards that all parties agree *do* apply directly to the KPS, the Ten States Standards, do not require any more than a single control panel.

The only other evidence indicating that two control panels are required is Heyl's assertion that the standard suggested by the EPA guidelines is "commonly applied to designs for critical facilities in this and other industries." In this regard, Heyl's opinion is entirely unsupported, and moreover, is contrary to the facts in evidence. As Heyl openly admitted, the Ten States Standards, upon which all parties rely and agree directly apply to the KPS, do not require that pumping stations utilize any more than a single control panel. In other words, to the extent Heyl opined that it is standard protocol to utilize two separate control panels at pumping stations like the KPS, the Ten States Standards directly contradict his opinion. All that exists, then, is an unsupported, conclusory averment by an expert regarding a supposed industry standard that is contrary to the only direct evidence of the standards that do apply to the KPS. Heyl's assertion is entirely insufficient to create a question of fact regarding the existence of a defect.²⁹

Without explicitly saying so, and despite Heyl's testimony to the contrary, the majority infers that the Ten States Standards *do* require two control panels in this instance.³⁰ That is simply not the case. The standard relied upon by the majority is standard 47.2. Standard 47.2 states:

Emergency pumping capability is required unless on-system overflow prevention is provided by adequate storage capacity. Emergency pumping capability shall be accomplished by connection of the station to at least two independent utility substations, or by provision of portable or in-place internal combustion engine equipment which will generate electrical or mechanical energy, or by the provision of portable pumping equipment. Such emergency standby systems shall have sufficient capacity to start up and maintain the total rated running capacity of the station. Regardless of the type of emergency standby system provided, a portable pump connection to the force main with rapid connection capabilities and appropriate valving shall be provided outside the dry well and wet well.

²⁹ *Rose*, 466 Mich at 470; *SSC Assoc Ltd Partnership*, 192 Mich App at 364. Arbour and VanLiere also opined that two control panels should have existed at the KPS. However, neither expert offered any factual foundation for their assertion. Each simply concurred in Heyl's unsupported opinion.

³⁰ *Ante* at 26 ("The Ten States Standards contemplate that a wastewater pumping facility must be powered by two entirely separate power sources, so that if one source is lost, the remaining source can run enough pumps to keep up with foreseeable peak flows. Plaintiffs' experts opined that the KPS failed to meet this standard, as a failure of one line—32T—shut down all the pumps.").

As can plainly be seen, control panels are *never mentioned in this standard*. Rather, the standard covers the provision of backup power sources in the event a station's main power source fails. The use of two separate power lines is only one of several potential methods by which a municipality can satisfy the standard; it can also be satisfied "by provision of portable or in-place internal combustion equipment," or in layman's terms, a generator. In other words, there is *no* requirement that the City power its pumps separately. It would have been entirely permissible under this standard for the City to power all eight pumps on a single power line, and in the event that line lost power, switch power to a backup power line, in-place generator, or portable generator. Thus, it is sufficient under the standard to have all pumps powered by a single power line, and if that single line fails, switch to another backup power source. As designed, that is precisely how the station operated. A failure on line 32T would stop all of the pumps, but once the switchgear activated, all power would be switched to line 191T. The standby generator would also activate and power the control panel.³¹ In sum, the use of a single control panel in no way violates the plain language of the Ten States Standards.

I also disagree with the majority to the extent it believes a question of fact exists regarding whether the failure to design the electrical system with two control panels caused the May event. The majority cites calculations from Arbour and VanLiere. These calculations are flawed in two respects. First, the calculations assume that the peak flows during the May event were those determined by the 1997 modeling data. But as previously explained, there is no information regarding what the actual peak flows were during the May storm. Thus, Arbour's and VanLiere's opinion that the existence of two control panels would have prevented the backups is a matter of speculation based only on a hypothetical example, insufficient to create a question of fact regarding causation.³² Second, the majority fails to explain that these calculations assume that the KPS had the additional capacity plaintiffs believe the KPS should have had, and then further assume that this capacity would be evenly split between the two control panels. As is discussed, the record establishes that the City did not need additional pumping capacity because it had already addressed the issue by reducing the flows to the KPS. The experts' opinions do not rely on facts of record as claimed by the majority; they rely on a hypothetical pumping station with hypothetical control systems. As such, plaintiffs have not presented evidence creating a question of fact regarding whether separate control panels would have prevented the flooding.

The final theory accepted by the majority is the lack of a gravity-fed emergency outlet, or CSO, in the Inland system. This theory suffers from one major and fatal flaw: there is no evidence demonstrating that it is even possible for the City to incorporate such a structure into the Inland system. Arbour explained that a CSO conveys excess flows to a lake, river, or retention pond. Clearly, excess sewage cannot be conveyed to a natural body of water. This was the precise issue that was to be eliminated under the administrative consent order. Moreover, Biehl again explained that it was not possible to convey excess flows by gravity because the

³¹ The investigation of the KPS undertaken after the events verified that these components operated as intended.

³² *Teal*, 283 Mich App at 394-395.

basements of homes in the Inland District are below the level of Lake St. Clair. The majority ignores this testimony, again attempting to categorize it as an unsupported opinion. However, the factual evidence the majority would require is provided by Biehl. The elevation of homes is a factual matter, not an opinion. If plaintiffs wished, they could have contested Biehl's affidavit by presenting contrary evidence. Plaintiffs did not.

This leaves only the possibility of conveying flows to a retention pond. Of course, there is no evidence that a retention pond currently exists. Plaintiffs' experts also offer no evidence of where a retention pond could be placed such that gravity alone would convey excess flows to it. One could also easily question where there is space for such a structure and whether the City would be allowed to build a retention pond that would store raw sewage. Without any evidence that building a CSO is even remotely feasible, I cannot conclude that a question of fact exists regarding whether the City's failure to build a CSO was unreasonable.³³

The CSO theory fails for at least one other reason: causation. Certainly, a CSO would have its limits. Sewage would have to be conveyed through some sort of system to the CSO. This system would have its own inherent flow and capacity limits. But in this case, plaintiffs offered no evidence of such limits. Their experts simply assert that a CSO would have prevented the floods. There is no explanation or factual basis for this opinion. On the record available, it is entirely unclear what effect, if any, plaintiffs' hypothetical CSO would have had in regard to the May storm. Stated differently, it is entirely possible that a CSO would not have been able to take on sufficient flows during the May event such as to prevent basement flooding. While it is possible that a CSO would have had some effect, a mere possibility of causation is not sufficient to demonstrate that a defect is *a proximate cause* of plaintiffs' damages,³⁴ let alone a "substantial proximate cause" of their damages.³⁵ The majority places far too much reliance on the conclusory statements of plaintiffs' experts.³⁶

This leaves the two remaining theories presented by plaintiffs. I agree with the majority that there is no evidence that the alleged operational and maintenance defects caused the basement flooding. The alleged operational defect was that after the second momentary power

³³ MCL 691.1417(3)(d). See also *Willet v Charter Twp of Waterford*, 271 Mich App 38, 54; 718 NW2d 386 (2006) (where the plaintiff offered no explanation of how a municipality could have more quickly removed a defect, the plaintiff had failed to present evidence creating a question of fact regarding whether the City had unreasonably failed to remedy the defect).

³⁴ *Skinner*, 445 Mich at 164-165.

³⁵ MCL 691.1416(l).

³⁶ *Rose*, 466 Mich at 470; *SSC Assoc Ltd Partnership*, 192 Mich App at 364. I also believe that the effect of the majority's conclusion should not be ignored. If the lack of a CSO is sufficient to open the door to liability in this instance, it would seem that every municipality in the state is now on alert: build a CSO or face potential liability for sewage discharge events. This appears to be the case, regardless of whether a plaintiff can demonstrate that it is even possible to build a CSO.

loss, Chauvin should have recognized that line 32T was unstable and manually transferred all power to 191T. However, the record demonstrates that flooding occurred after the first power loss. There is no evidence that the backups would have been prevented had Chauvin done as Arbour suggested. Arbour also stated that an alleged lack of maintenance contributed to the backups, but he provided no explanation of how this was so. His unexplained, conclusory statements do not present a genuine question of fact regarding causation.³⁷ There is also no evidence of any maintenance defects whatsoever. Arbour never visited the KPS himself. Instead, he asserted that he found no evidence of records indicating that proper maintenance had ever been done at the KPS, and on this basis, opined that the City must have failed to properly perform maintenance. To be blunt, that Arbour found no evidence of maintenance having been performed does not demonstrate that no maintenance occurred. As is often said, the absence of evidence is not evidence of absence.³⁸ Moreover, when an inspection of the KPS was actually conducted, it found that the KPS was well-maintained.

This leaves plaintiffs' contention that pump eight, due to its missing protective devices, caused the momentary power fluctuations experienced during the May event. Plaintiffs rely on Olane's deposition testimony.³⁹ At his deposition, Olane theorized that, with these devices removed, it was possible that pump eight would draw more power than intended, and that this increased power demand could have caused the power fluctuations on line 32T. However, Olane specifically stated that he was only speculating and that it was unlikely that pump eight caused the fluctuations. Olane noted that DTE attributed the fluctuations to problems with tree limbs. Olane's theory was simply a guess, and one that even he did not believe actually occurred. On this record, plaintiffs cannot establish a question of fact regarding whether pump eight was a proximate cause of the May floods.⁴⁰

In the end, then, all that is left with regard to the May event is a rather obvious conclusion: power outages, outages which cannot be attributed to the City, caused the backups. As it pertains to the various theories relied upon by the majority, I conclude that each fails to create a triable question of fact with regard to at least one of the elements that must be demonstrated. As such, I would affirm the trial court's decision with regard to the May event.

2. THE SEPTEMBER EVENT

As the majority notes, plaintiffs essentially rely on the same theories discussed above to avoid summary disposition with regard to the September event. For the same reasons discussed

³⁷ *Rose*, 466 Mich at 470.

³⁸ See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 406 US App DC 371, 381; 725 F3d 244 (2013).

³⁹ It is worth noting that this deposition was taken on October 23, 2013. Yet, plaintiffs did not raise the theory in their initial response to the City's motion, filed two days later. Instead, plaintiffs waited to present this theory until October 30, 2013, the day before the motion hearing.

⁴⁰ *Skinner*, 445 Mich at 164-165.

above, I do not believe any of these theories are sufficient to avoid summary disposition. However, the circumstances of the September event are not precisely the same as the May event, warranting further discussion. Once again, the cause of the September backups is seemingly obvious. A second severe storm struck, this time in the middle of the night. During the storm, power surges disabled the pumps for a substantial period of time. During this time, basements flooded. Thus, it would seem fairly clear that the cause of the September floods is the loss of power at the KPS. Once again, plaintiffs attempt to place the blame for the backups on the City's shoulders.

With regard to plaintiffs' capacity theory, it is absolutely clear that a lack of overall pumping capacity was not a substantial proximate cause of the September backups. Unlike the May event, the record does include actual measurements of flow rates at the KPS during the September storm. According to VanLiere, the available flow measurements showed that up until the point when the KPS lost power, the peak flow did not exceed 230 CFS. Even with its largest pump out of service, the KPS's pumping ability far exceeded the actual flow measured.⁴¹ As such, there is no question of fact regarding whether the September flooding was caused by a lack of overall pumping capacity.

As it pertains to the lack of a second control panel, I do not believe that there is any question of fact regarding whether the existing control panel configuration was defective. Moreover, VanLiere's opinion that such a configuration would have prevented the backups was again based on an assumption that the KPS would have the additional pumping capacity he believed was required. And as it pertains to the nonexistence of a CSO, I would similarly conclude that there is no evidence suggesting that it was even possible to build a CSO or that a CSO would have prevented the flooding. With regard to maintenance defects, there again is no evidence that the flooding in September was caused by improper maintenance.

Plaintiffs also suggested that it was the failure to discover that the FU-2 fuse had blown and replace it a timely manner that was a substantial proximate cause of the floods. However, the record demonstrates that the backups occurred long before Homminga arrived at the KPS and even had the opportunity to replace the fuse. Plaintiffs also argued that pump eight was inoperable during the September storm, and that this was a substantial proximate cause of the floods. However, the record demonstrates that pump eight was operable and did run when activated in September. Plaintiffs also argued below that a properly trained operator would have discovered that line 32T was unstable during the September event and manually transferred power to line 191T. This argument conflates the May and September events. In May, line 32T experienced instability, but that was not the case in September. Moreover, no one was even

⁴¹ This information exemplifies why it is improper to rely on the hypothetical peak flows as described by the 1997 report with regard to the May event. As the majority notes, the record demonstrates that the September storm was a 25-year, 18-hour event, more severe than the May event. The modeling data suggested that flows could potentially reach 600 CFS during a 25-year, 24-hour event. Yet in reality, the flows of the actual storm were, at most, 230 CFS—approximately 40% of the predicted flows.

present at the KPS when it lost power and backups were occurring. Thus, under this theory, there was no operator who could have transferred power to 191T in time to prevent the September backups.⁴²

The final defect alleged by the homeowners was that a damaged surge suppressor in pump seven caused the power outages. This theory is again based on Olane's deposition testimony. A fair reading of Olane's testimony makes clear that, while he believed the damaged surge suppressor may have caused both power losses at the station, this was only a possibility that was consistent with the known facts. In other words, his opinion was conjecture, insufficient to create a question of fact regarding whether the damaged suppressor actually caused the pumps to shut down.⁴³ More importantly, however, Olane testified that the suppressor was damaged during the September storm. There is no evidence whatsoever that the City was aware of the damaged suppressor or that it could have repaired it before the backups occurred. Thus, even if this could be considered a defect, the homeowners did not present evidence sufficient to avoid governmental immunity.⁴⁴

III. THE MAJORITY'S CONCLUSION

On a final note, even if I were to accept the majority's resolution of the issues discussed above, I would not submit the matter to a jury. Because the City sought summary disposition pursuant to MCR 2.116(C)(7), any factual disputes are not to be resolved by a jury, but by the trial court. As this Court has explained:

A trial is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity. Indeed, the crux of the case is the determination of the threshold issue whether governmental immunity protects defendants' conduct or whether that conduct fell outside the immunity protection through application of the proprietary function exception.^[45]

Thus, when material questions of fact exist with regard to whether a claim is barred by governmental immunity, the proper procedure is for the trial court to resolve these factual questions, utilizing an evidentiary hearing if necessary, and to determine whether the governmental agency is entitled to immunity as a matter of law.⁴⁶ Indeed, all parties agree that these are the proper steps to take if the case is remanded to the trial court. If I believed factual questions existed such that a remand was necessary, I would specifically direct the trial court to resolve those questions and determine the issue as a matter of law. But finding no such

⁴² Plaintiffs have never alleged that the City did not arrive at the KPS in sufficient time under the circumstances.

⁴³ *Skinner*, 445 Mich at 163-164.

⁴⁴ MCL 691.1417(3)(d).

⁴⁵ *Dextrom v Wayne Co*, 287 Mich App 406, 430; 789 NW2d 211 (2010).

⁴⁶ *Id.* at 430-433.

questions, I would affirm the trial court's decision with regard to the May cases, reverse the trial court's decision with regard to the September cases, and remand for entry of an order granting summary disposition in favor of the City with regard to the September cases.

/s/ Michael J. Talbot